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IN THE

Supreme Court of the United States

..... TERM

No. 472

B. A. WATSON,

Petitioner,

v.

GULF STEVEDORE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS

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GULF STEVEDORE CORPORATION,

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PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS

B. A. WATSON, petitioner, prays that writ of certiorari issue to review the Judgment of the Fifth Circuit Court of Appeals entered in the above and entitled cause on the 28th day of March, 1967, and its Order refusing Rehearing En Banc, entered on the 8th day of May, 1967.

CITATIONS OF OPINION BELOW

The opinion of the Trial Court appears in *257 F.S. 503;* the opinion of the Fifth Circuit Court of Appeals and Order overruling petition for Rehearing is reported in *347 F2d. 946.*

JURISDICTION

Jurisdiction of this Court is invoked under *28 USC 1254 (1)* and under *Supreme Court Rule 19(1)b.*

QUESTION PRESENTED

May an injured longshoreman as a third-party beneficiary of his employer's warranty to the vesselowner of workmanlike service or as the equitable owner of the shipowners right to indemnity maintain a suit against his nonshipowner stevedore employer for damages resulting from injury notwithstanding the provisions of *33 USC 905*, where the injury is caused by the unseaworthiness of the vessel resulting from his employers breach of its warranty of workmanlike service and he is unable to bring suit against the vesselowner because of its absence and the vessel being transferred several times and reported broken up, with its bow incorporated into another vessel, et cetera?

STATUTES INVOLVED

1. Section 905 (33 USC) of the Longshoremen's and Harbor Workers' Compensation Act, printed in Appendix D.

2. Warranty of seaworthiness under the General Maritime Law.

3. The Stevedore's obligation to perform its work aboard the vessel in a workmanlike manner.

4. Restatement of Law of Contracts Sec. 133 printed in Appendix E.

STATEMENT OF THE CASE

On February 6, 1957, petitioner, B. A. WATSON, while employed as a longshoreman by respondent, GULF

STEVEDORE CORPORATION, who had no ownership or operational interest in the vessel upon which he sustained very serious injuries because of the unseaworthiness of the vessel, "SAN DIMITRIS". The vessel was owned by a one ship foreign corporation, flying a foreign flag, which vessel has changed owners and names on several occasions and has been reported broken up and the bow incorporated into another vessel. Appellant was unable to sue the owner by reason of the foregoing and other reasons. Petitioner, not being able to sue the vesselowner, sought to maintain suit against his stevedore employer for full damages as a third-party beneficiary of his employer's warranty of workmanlike service and as the equitable owner of the shipowners right to indemnity. Respondent moved for Summary Judgment based on *Section 33 USC 905* printed in Appendix D. The Trial Court sustained Motion for Summary Judgment holding *33 USC 905, supra* was an absolute bar to prevent the bringing of the suit. On the 28th day of March, 1967, the Fifth Circuit Court of Appeals affirmed the Trial Court's decision holding that there was no authority for appellant to maintain the suit as a third-party beneficiary of the stevedore's warranty of workmanlike service or as the equitable owner of the shipowners right to indemnity, and that *33 USC 905* was an absolute bar to the suit being maintained and further held that longshoremen were assured of their employer being required to pay compensation. On the 8th day of May, 1967, Petition for Rehearing En Banc was denied. As an incident to the injury, petitioner has sought total and permanent disability benefits under the Longshoremen's and Harbor Workers' Compensation Act and asks the Court to judicially notice, see *Wells* v. *United States 318 U.S. 257 p. 260*, that petitioner in Cause No. 3269-212 Styled Bertram A. Watson v. Gulf Stevedore Corporation and Texas Employers' Insurance Association, before the Deputy Commissioner of Labor was found to

be totally and permanently disabled by reason of the injury, the Order is printed as Appendix F. Respondent appealed, which appeal was docketed as Cause No. 66-H-881, Styled Gulf Stevedore Corporation, *et al*, v. R. J. Shea, Deputy Commissioner, *et al.*, Southern District of Texas, Houston Division; the Order of the Deputy Commissioner was then set aside; the District Court's opinion is printed as Appendix G. Neither of the foregoing are reported to petitioner's knowledge. Petitioner has taken an appeal which is now pending in Cause No. 25,007 in the Fifth Circuit Court of Appeals, from the Order of the District Court setting aside the Compensation Order. Petitioner continues to be totally disabled by reason of the injury with respondent by the use of the technical defense posed by *33 USC 905* in view of its warranty of workmanlike service, thwarting a recovery under the General Maritime Law and by appealing the Deputy Commissioner's ruling is avoiding payment of compensation. The remedy of compensation for the time being is an empty promise.

REASONS FOR GRANTING THE WRIT

This case presents a novel theory of first impression as applied to this body of the Maritime Law which should be decided by this Court. The allowance of the suit to be maintained would permit substantial justice between the parties and allow the petitioner to assert the same remedy which he could assert against the vesselowner if he were able to get the vesselowner in the Courthouse. The only basis for the Motion for Summary Judgment by the Trial Court was that *33 USC 905* precluded the bringing of the suit. This Court refused in *Ryan Stevedoring Co.* v. *Pan Atlantic Steamship Corp., 350 U.S. 124, p. 131; 76 S. Ct. 232, p. 236,* to apply a literal reading of *Section 33 USC 905* and held that *905, supra,* did not apply to the warranty of workmanlike service which the stevedore owed the vesselowner.

This Court recognized in *Ryan, supra,* that the stevedore upon going aboard the vessel owed a different duty to the vesselowner than it did to its employee. Petitioner has sued upon that duty owed by respondent to the vesselowner, not the duty owed by respondent to petitioner as its employee. Having already held in *Seas Shipping Co.* v. *Sieracki 378 U.S. 85; 66 S. Ct. 872,* that the vesselowner owed the warranty of seaworthiness to longshoremen historically performing the service of the vessel, this Court in order to achieve substantial justice between the stevedore employer and the vesselowner held in *Ryan, supra,* that the Stevedore owed the warranty of workmanlike service and if such breach of warranty of workmanlike service caused injury to the employee of the stevedore, that notwithstanding *33 USC 905,* any recovery that was had by the employee of the stevedore under such circumstances as in *Ryan, supra,* together with the cost of defense would have to be paid as an indemnity by the stevedore. In *Crumady* v. *Joachim Hendrik Fisser, 358 U.S. 423, p. 429; 79 S. Ct. 445, p. 448,* this Court recognized the law of third-party beneficiaries as the modern interpretation of the law to achieve justice was applicable and would be applied to a maritime cause of action and allowed a recovery where the breach of warranty brought the unseaworthy condition into play. See also *Waterman Steamship Corp.* v. *Dugan & McNamara, Inc. 364 U.S. 421, p. 424; 81 S. Ct. 200, p. 202.* This Court in *Reed* v. *Yaka, 373 U.S. 410; 83A S. Ct. 1349* refused to follow a literal reading of *33 USC 905* where the stevedore appeared in the dual capacity of stevedore and vesselowner and in *Jackson* v. *Lykes Bros. S.S. Co., Inc.,* ..... U.S.....; *87 S. Ct. 1419 decided May 8, 1967,* reiterated its position that where the vesselowner acted not only as a vesselowner but as an employer of longshoremen, that *Section 905, supra,* provided no defense to the cause of action for damages based on the warranty of seaworthiness. In *Italia Societa* v.

Oregon Stevedoring Co., Inc. 376 U.S. 315; 84 S. Ct. 748, Footnote No. 6, it held that if the stevedore was liable in warranty for creating an unseaworthy condition causing injury, *905, supra,* was no bar to a recovery by the shipowner and in *Pacific Inland Navigation Co.* v. *Course, 9th Cir. 368 F2d. 540,* certiorari denied, the 9th Circuit on page 542, ". . . . In *Ryan* the imposition on the employer of the economic burden of its employee's recovery for unseaworthiness was allowed notwithstanding the provisions of P. 905. This result, however, was justified upon the ground that by its warranty to the shipowner the employer took upon itself not only its limited obligations to its employee under the Act, but the obligations of the shipowner as well." See also, the 9th Circuit Opinion of *Seattle Stevedoring Co.* v. *Compania Maritima & Maritime Co. of the Philippines, 373 F2d. 9, p. 11,* ". . . . Since *Italia Societa de Navegacion* v. *Oregon Stevedoring Co., Inc., 376 U.S. 315, 84 S. Ct. 748; 11 Law Ed. 2d 732 (1964),* there can be no reasonable doubt that the stevedore's implied warranty to the shipowner is governed by the same standard as and is co-extensive with the shipowners' obligation to seamen and others of that category . . .". Under the restatement of the law of contracts [paragraph 133], petitioner would be a third-party beneficiary of the stevedore's warranty of workmanlike service for the vesselowner was obligated to comply with the maritime law relating to seaworthiness and in this case, the vessel was rendered unseaworthy or its unseaworthiness was brought into play by the stevedore's breach of its warranty of workmanlike service which caused a breach of the vesselowner's warranty of a seaworthy vessel. The Admiralty Court is bound by its nature and Constitution to give judgment upon equitable principles according to the rules of natural justice, see *Benedict on Admiralty, Vol. I, p. 151* citing *U.S.* v. *Cornell Shipbuilding Co., 202*

U.S. 84, 50 Law Ed. 987, 26 S. Ct. 648, and *The Kalfarli 277 F 391 2nd Cir.* It is a Court of Justice . . . . See *Benedict on Admiralty Vol. I., supra, paragraph 71, p. 151, supra,* citing *Andrews* v. *The Essex Fire and Marine Insurance Co., (1822), 3 Mason 6 F, case 374 Cir. Ct. of Massachusetts.* The rulings of the courts below ignore and refuse to follow this Court's precept that *Section 33 USC 905* is not an all inclusive bar to a recovery by the injured longshoreman but that the bar stated therein depends upon the circumstances. Petitioner's suit was not brought upon a duty owed by respondent to petitioner as its employee, but to repeat, it was brought as a third-party beneficiary to his employers' warranty of workmanlike service or as the equitable owner of the shipowner's right to indemnity resulting from the respondent's breach of its duty to the vesselowner to perform its work in a workmanlike manner resulting in the unseaworthiness of the vessel causing his injury which was a breach of duty owed by the shipowner to the petitioner. Petitioner was the equitable owner of the shopowners' right to indemnity, see, *Davis* v. *Dittmar, 2nd Cir. 6 F2d. 141.* Under the circumstances, petitioner submits that the lower court's ruling is contrary to this Court's previous ruling in spirit, that all longshoremen should be treated equally under the eyes of the law because equality of treatment under the decisions of the lower courts would depend in cases where the breach of warranty of seaworthiness is caused or brought into play by the stevedore's breach of warranty of workmanlike service upon the fortitious circumstance of the financial stability of the vessel owner (number of vessels operated, etc.) and the opportunity of the injured longshoreman to get the vesselowner into the courthouse even though the vessel owner would be entitled to indemnity from the stevedore employer under *Ryan, supra.*

CONCLUSION

For the foregoing reasons, this petition for writ of cetiorari should be granted.

Respectfully Submitted,

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PROOF OF SERVICE.

I, BILL ALLEN, attorney for petitioner and being a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Petition for Writ of Certiorari upon Mr. Carl O. Bue, Jr., Royston, Rayzor & Cook, counsel for respondent, by mailing three copies thereof postage prepaid, addressed to his office at 877 San Jacinto Building, Houston, Texas 77002, dated this 4 day of August, 1967.

BILL ALLEN

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23579

BERTRAM A. WATSON,
Appellant,

v.

GULF STEVEDORE CORPORATION,
Appellee.

Appeal from the United States District Court for the Southern District of Texas

(March 28, 1967.)

Before HUTCHESON, GEWIN and COLEMAN, Circuit Judges.

HUTCHESON, Circuit Judge: The question presented is whether a libel for damages may be brought by a longshoreman-employee directly against the employer-stevedore despite the exclusiveness of liability provision of the Longshoremen's and Harbor Workers' Compensation Act.[1] The district court answered this question in the negative and accordingly granted a summary judgment in favor of the employer-stevedore.[2] We affirm.

[1] 33 U.S.C. Sec. 905, which provides in pertinent part:

> The liability of an employer [for compensation] shall be exclusive and in place of all other liability of such employer to the employee . . . and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . .

[2] 257 F. Supp. 503 (S.D. Tex. 1965).

The libellant Watson, a longshoreman, employed by appellee Gulf Stevedoring Corporation, was injured while handling cargo aboard the SS SAN DIMITRIS in Houston, Texas. It is important that the employer occupied solely the position of a shoreside stevedoring company having no ownership or operational interest in the vessel. The employer-stevedore's contract was with Luria Bros., a cargo owner and space charterer, rather than with the vessel owner. Libellant declares he was unable to bring the libel against the vessel or vessel owner because the vessel has changed ownership and names several times since the injury, and, in addition, has been broken up. Instead, he filed this libel against the employer-stevedore *in personam* on August 1, 1963, approximately six years after the accident happened on February 6, 1957.

The obstacle, which we hold to be insurmountable, in the path of this libel is 33 U.S.C. Sec. 905 which states in part that the liability of an employer for compensation "shall be exclusive and in place of all other liability of such employer to the employee . . . on account of such injury . . . ." Although this section deprives employees of certain common-law rights and thus the chance to obtain large tort verdicts against their employers, it in turn grants them the quid pro quo of assured compensation. On the other hand, while the employers are required to pay compensation regardless of fault, their benefit is the certainty of limited liability.[3] But it is to be remembered that the employee's right of recovery is limited by Sec. 905 only as against the employer; the employee remains free to sue nonemployer third parties for damages. See *Seas Shipping Co., Inc.* v. *Sieracki*, 328 U.S. 85, 101-102 (1946); 33 U.S.C. Sec. 933.

[3] See Ryan Stevedoring Co., Inc. v. Pan-Atlantic Corp., 350 U.S. 124, 129, 140 (1956); Smither & Co., Inc. v. Coles, 242 F. 2d 220, 222-23 (D.C. Cir.), cert. denied, 354 U.S. 914 (1957); Haynes v. Rederi A/S Aladdin, 362 F. 2d 345, 350 (5th Cir. 1966).

The theory of the libel before us is based upon settled principles. The vessel owner owes to the longshoreman the nondelegable obligation to maintain a seaworthy vessel; hence, the longshoreman may sue the vessel owner *in personam* or the vessel *in rem* for injuries caused by unseaworthiness. *Waterman Steamship Corp.* v. *Dugan & McNamara, Inc.*, 364 U.S. 421, 424 (1960); *Seas Shipping Co., Inc.* v. *Sieracki, supra.* Furthermore, the stevedoring company impliedly warrants that it will perform its stevedoring services in a workmanlike manner; thus the stevedore must indemnify the vessel owner for damages paid to the longshoreman when a breach of the warranty of workmanlike service brings into play the vessel's unseaworthiness.[4] Using those established principles as a platform, libellant urges two contentions on which he attempts to sue the employer-stevedore directly: first, that the longshoreman is a third-party beneficiary of the warranty of workmanlike service; second, that the longshoreman is the equitable owner of the vesel owner's claim for indemnity against the stevedore.

Both contentions assume the vessel's unseaworthiness which present law permits to be adjudicated only in an action against the vessel or its owner. To allow an adjudication of unseaworthiness in a libel by a longshoreman against the employer-stevedore plainly would destroy Sec. 905. It is true that both the vessel and its owner are regarded as third-party beneficiaries of a stevedoring contract between the stevedore and someone other than the vessel owner, such as a charterer[5] or a consignee[6] of the

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[4] Italia Societa v. Oregon Stevedoring Co., Inc., 376 U.S. 315 (1964); Crumady v. The J. H. Fisser, 358 U.S. 423, 429 (1959); Ryan Stevedoring Co., Inc. v. Pan-Atlantic Corp., supra note 3, at 132; Waterman Steamship Corp. v. David, 353 F. 2d 660, 661-62 (5th Cir.), cert. denied, 384 U.S. 972 (1966).

[5] Crumady v. The J. H. Fisser, supra note 4, at 428.

[6] Waterman Steamship Corp. v. Dugan & McNamara, Inc., 364 U.S. 421, 424-25 (1960).

cargo.[7] But there is no authority either that the longshoreman is similarly regarded[8] or that he is the equitable owner of the indemnification claim. Refusing to overlook the clear language of Sec. 905, we hold that this employee's sole and exclusive remedy, if any, is against the vessel owner.[9]

Reed v. *The Yaka*, 373 U.S. 410 (1963) clearly is distinguishable from the instant case. There the Court held that the employee could maintain a libel for damages against his employer because the employer also happened to be the bareboat charterer, or owner *pro hac vice*, and as such was liable for unseaworthiness.[10] Here, however, the stevedore, who had no operational interest in the vessel, was not charged with the obligation of seaworthiness.

We conclude that the district court was right in holding that this libel is precluded by Sec. 905. The judgment is

AFFIRMED.

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[7] This is because "the warranty which a stevedore owes when he goes abroad a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not." Crumady v. The J. H. Fisser, supra note 4, at 428. Thus nothing in this case turns upon the fact that the stevedore was engaged by the space charterer and cargo owner rather than by the vessel owner.

[8] See Ferrigno v. Ocean Transport Ltd., 309 F. 2d 445 (2d Cir. 1962); Sanderlin v. Old Dominion Stevedoring Corp., 261 F. Supp. 281 (E.D. Va. 1966).

[9] Accord, Rodgers v. Baltimore & Ohio R.R., 323 F. 2d 996 (2d Cir. 1963), cert. denied, 376 U.S. 932 (1964); Kyles v. James W. Elwell & Co., 296 F. 2d 703, 706 (7th Cir. 1961), cert. denied, 369 U.S. 852 (1962); Thibodeaux v. J. Ray McDermott & Co., 276 F. 2d 42 (5th Cir. 1960); Smither & Co., Inc. v. Coles, supra; Garland v. The S.S. Illiamna, 198 F. Supp. 187 (D. Alaska 1961); Skow v. Gypsum Carrier, Inc., 164 F. Supp. 879 (N. D. Cal. 1958).

[10] See also Grace Line, Inc. v. Kanton, 366 F. 2d 510 (9th Cir. 1966) (per curiam); Miculka v. American Mail Line, Ltd., 229 F. Supp. 665 (D. Ore. 1964).

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 23579

BERTRAM A. WATSON,

Appellant,

v.

GULF STEVEDORE CORPORATION,

Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(May 8, 1967)

On Petition for Rehearing

Before HUTCHESON, GEWIN and COLEMAN, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and number cause be, and it is hereby DENIED.

APPENDIX C

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BERTRAM A. WATSON,

Libellant

v.

GULF STEVEDORE CORPORATION,

Respondent

A. D. NO. 63-H-101

W. JILES ROBERTS of Houston, Texas;
Proctor for Libellant.

ROYSTON, RAYZOR & COOK (CARL O. BUE, JR.)
of Houston, Texas; Proctor for Respondent.

December 28, 1965

Memorandum and Order of Dismissal:

Petitioner longshoreman, while in the employment of the Respondent stevedoring company, was injured while working aboard the SS SAN DIMITRIS in February of 1957 in the Port of Houston, Texas.

Petitioner purports to sue its own employer directly on the theory that he is the third-party beneficiary of an implied warranty by Respondent to the vessel owners that it would perform its stevedoring duties in a workmanlike manner with its failure to do so rendering the vessel unseaworthy. This suit is brought notwithshanding the exclusive liability provision as against an employer in the Longshoremen's and Harbor Workers' Compensation Act, Section 905 of Title 33, USCA, which it is not disputed is otherwise applicable.

Petitioner relies upon the doctrine in *Reed* v. *The Yaka*, 373 U.S. 410, and upon an extension of the principle that a vessel owner has a right of indemnity as against a stevedoring contractor for its breach of warranty. *Ryan Co.* v. *Pan-Atlantic Corporation*, 350 U.S. 124 and *Waterman Steamship Corporation* v. *Dugan and McNamara, Inc.*, 364 U.S. 421. See also *Italia Societa* v. *Oregon Stevedoring Co.* 376 U.S. 315. But no authorities are cited nor can any be found that extend either proposition to the length sought here. This case involves no prior adjudication of the vessel's liability for unseaworthiness.

The Yaka clothes a longshoreman *injured abroad a particular vessel* (emphasis added throughout) with the status of a "seaman" insofar as his *right to sue the vessel* for unseaworthiness is concerned notwithstanding the exclusive remedy provision of Section 905. In respect to instant case, it is only incidental that in *The Yaka* the longshoreman's employer was also the owner of the vessel *pro hoc vice*. The record shows that Respondent in instant case had no relationship with the vessel other than as contracting stevedore.

Petitioner's reliance on a third-party right of indemnity is equally untenable. It would directly contradict and frus-

trate the purpose of Section 905. This right of indemnity inures to the benefit of the innocent vessel owner where her unseaworthiness is caused by the employer's breach of warranty. It would be another thing to say that it negates the protection which the employer has under the compensation act in respect to an *in personam* action by a longshoreman.

For the foregoing reasons, the Respondent's Motion to Dismnss is granted.

It is hereby ORDERED, ADJUDGED and DECREED that this Libel is dismissed with prejudice and Libellant to pay costs.

The Clerk will notify proctors.

/s/ ALLEN B. HANNAY

United States District Judge

APPENDIX D

§ 905. Exclusiveness of Liability

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee. Mar. 4, 1927, c. 509, § 5, 44 Stat. 1426.

APPENDIX E

§ 133. Definition of Donee Beneficiary, Creditor Beneficiary, Incidental Beneficiary.

(1) Where performance of a promise in a contract will benefit a person other than the promisee, that person is, except as stated in Subsection (3):

(a) a donee beneficiary if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary;

(b) a creditor beneficiary if no purpose to make a gift appears from the terms of the promise in view of the accompanying circumstances and performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary, or a right of the beneficiary against the promisee which has been barred by the Statute of Limitations or by a discharge in bankruptcy, or which is unenforceable because of the Statute of Frauds;

(c) an incidental beneficiary if neither the facts stated in Clause (a) nor those stated in Clause (b) exist.

(2) Such a promise as is described in Subsection (1a) is a gift promise. Such a promise as is described in Subsection (1b) is a promise to discharge the promisee's duty.

(3) Where it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee is to benefit a beneficiary under a trust and the promise is to render performance to the trustee, the trustee, and not the beneficiary under the trust, is a beneficiary within the meaning of this Section.

APPENDIX F

UNITED STATES DEPARTMENT OF LABOR

BUREAU OF EMPLOYEES' COMPENSATION
EIGHTH COMPENSATION DISTRICT

In the matter of the Claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act

BERTRAM A. WATSON
Claimant

vs.

GULF STEVEDORE CORPORATION
Employer

TEXAS EMPLOYERS' INSURANCE ASSOCIATION
Insurance Carrier

Compensation Order
Award of Compensation
Case No. 3269-212

Such investigation in respect to the above-entitled claim having been heard as is considered necessary, and

A hearing having been duly held in conformity with law,

The Deputy Commissioner makes the following

FINDINGS OF FACTS

1. On February 6, 1957, the claimant above-named was in the employ of the employer above-named at Houston, Texas, in the Eighth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. The liability of the employer for compensation under the said Act was insured by the Texas Employers' Insurance Association.

2. On the said day the claimant, while performing service as a longshoreman for the employer aboard the vessel S/S "San Dimitris", upon the navigable waters of the United States, sustained injury resulting in disability. He was in the hold cleaning off end of trimming stage and a load of scrap iron was dumped on stage, sliding down onto him, crushing his left leg. Following many operations over a period of several years in an effort to save the leg, eventually it became necessary to amputate it in 1962.

3. Written notice of injury was not given to the employer within 30 days but the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice. The employer furnished the claimant with medical treatment, etc., in accordance with the provisions of Section 7(a) of the said Act. The average weekly wage of the claimant at the time of the injury was in excess of $81.00 per week, thereby making the maximum provision of $54.00 weekly compensation applicable. He was not paid full wages for day of injury.

4. As a result of the injury the claimant was wholly disabled and was paid compensation for temporary total disability from February 6, 1957, to August 10, 1966, less time worked November 21, 1962 to April 7, 1966, 320 weeks at $54.00 per week, $17,280.00, the statutory limitation for temporary total disability or permanent partial disability, and, indeed, paid an amount of $378.00 beyond the stautory limitation, making the total payment of $17,658.00. The claim is, therefore, made for permanent and total disability.

5. The claimant since the date of the injury and even since the amputation in 1962 continued to be under regular follow-up care by Dr. George H. Lane, orthopedic surgeon. While osteomyelitis developed in the left leg following the injury, for all practical purposes testimony shows the claim-

ant no longer has osteomyeltitis in his system, because the site of the disease has been amputated. This, however, does not preclude the possibility, though slim, it may be, because of the dormant nature of the disease of osteomyelitis.

6. The last operative procedure was in April of 1966 which was for a small ulcer on the head of the stump from the pressure of the prosthesis. This ulcer was excised. There was also involved a superficial infection. A pathologist's report showed chronic inflammatory cells. This ulcer, therefore, had been present for a long period of time and the infection was all the way through the skin down to the subcuteneous tissues. Testimony of Dr. Lane shows that this ulceration is likely to recur from time to time.

7. There is no question that the claimant has been totally disabled since April of 1966 and he has been unable to wear his prosthesis since about that time. There is a distinct possibility that further plastic surgery will be required perhaps involving shortening of the stump. Inasmuch as the claimant obviously is totally disabled at this time and since April of 1966, it would be speculation on the part of the Deputy Commissioner to hold this condition not to be permanent. The claimant since April of 1966 has been under constant active medical treatment in an attempt to clear up the condition of the stump.

Dr. Lane testified he had no idea how long it would take to clear up the condition. Definite program is being followed and if the claimant is able at some time in the indefinite future to wear the prosthesis, that is one thing; if not, further plastic surgery (flapping) will be necessary with the possibility of shortening the stump.

8. One of the main problems is the closeness of the bone of the stump to the skin surface. There is little, if any, protective tissue.

Dr. Lane also testified that this case is complicated beyond the extent of most amputees' conditions. The claimant has more problems than the usual amputee by reason of having had cross-leg graft. The cross-leg graft was done prior to the amputation of the leg, in an attempt to save it.

By reason of this plastic surgery method, the claimant's right, or remaining, leg has disminished sensation, frequently aches, cramps and swells. The right leg feels dead and cramps after the claimant walks a distance of approximately two or three blocks. He is then forced to rest in order to relieve the cramping. The leg also cramps when the claimant is forced to be on it for a period in excess of 30-40 minutes. The claimant has sustained significant disability to the right, or remaining, leg.

9. The claimant has a high seniority on the waterfront (gold star button) and was able when he worked from November of 1962 to April of 1966 to obtain key jobs, but found in late 1965 even the inability to perform many of these jobs, such as gang foreman because the job required considerable walking and some climbing.

10. The claimant has been doing longshore work off and on since 1936. The claimant has an eighth grade education, was a cook in the U. S. Navy and his other work experience was that of a drag line operator. The claimant is 45 years of age. His mental equipment had fitted him for manual labor only. He cannot return to work as a regular longshoreman and he cannot engage in unrestricted manual labor for any sustained period of time.

11. It is well established from a medical standpoint he cannot pass a pre-employment medical examination on the open labor market for work that requires even moderate physical exertion, such as prolonged walking or climbing. The disability the claimant sustained as a result of the

injury in question is permanent. He cannot return to the regular work of a longshoreman.

12. The claimant by reason of his injury is unable to perform any kind of arduous labor in that he is unable to perform all of the substantial and material acts of his employment in the usual and customary way. He is also unable to procure remunerative employment at a different occupation suitable to his impaired capacity. The claimant is not educationally or mentally equipped to perform any work of a sedentary nature. Considering his age, education and prior work experience, the claimant has no wage earning capacity on the open labor market. He has, in essence, suffered a total loss of whatever wage earning capacity he had at the time of his 1957 injury. The total loss of wage earning capacity that he had at the time of the 1957 injury was caused solely by such injury.

13. Prior to the injury of February 6, 1957 the claimant sustained a right shoulder injury in 1953.

In August of 1965 the claimant sustained an injury to the groin area which resulted in the surgical removal of his right testicle. Although at the time of the 1953 injury when a suit was brought it was alleged and found that he had permanent disability to his right shoulder, the claimant, in fact, has fully recovered from any residual of that injury. The claimant testified that he had fully recovered and examination at the hearing showed a full range of motion in the shoulder and no residual disability. The claimant also testified that the residual of the 1965 groin injury does not affect his capacity to work and the insurance carrier and the employer produced no evidence to the contrary. Neither the 1953 nor the 1965 injuries contributed in any way to the claimant's present total disability. Neither of these two injuries relate to his general efficiency and they have no relationship whatsoever to his total disability.

14. The claimant has been wholly disabled since April 8, 1966 to the present time and it is found that the disability due to the injury was total and permanent and he is entitled to compensation at $54.00 per week without limitation as to total amount as provided by Section 14(m) of the Longshoremen's and Harbor Workers' Compensation Act. The employer and the insurance carrier have paid 7 weeks' compensation at $54.00 per week, $378.00, beyond the statutory limitation of $17,280.00. Compensation has in effect been paid through August 10, 1966.

15. The insurance carrier should continue to provide any medical care that the claimant requires.

Upon the foregoing findings of fact the Deputy Commissioner makes the following

AWARD

The employer, the Gulf Stevedore Corporation, and the insurance carrier, the Texas Employers' Insurance Association, shall pay to the claimant compensation as follows: For temporary total disability from February 6, 1957 to December 7, 1966, less time worked November 21, 1962 to April 7, 1966, 344 weeks at $54.00 per week, $18,576.00.

The employer and the insurance carrier having paid $17,658.00 to the claimant as compensation shall pay forthwith $918.00. Subsequent to December 7, 1966, they shall continue to pay compensation for permanent and total disability in bi-weekly installments at $54.00 per week until the death of the claimant or further order of the Deputy Commissioner.

An attorney's fee of $684.87 is approved in favor of W. Jiles Roberts, Attorney, for services rendered on behalf of the claimant $(284.87 of which is for Zeroz copy of Methodist Hospital record, photostats, photographs, U. S.

Marshal's fee, witness fee and review of Methodist Hospital chart), such sum to be a lien upon and be paid out of this award.

Given under my hand and filed at Galveston, Texas, on this 8th day of December, 1966.

/s/ R. J. SHEA
R. J. Shea
Deputy Commissioner
Eighth Compensation District

PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent to the claimant, the employer and the insurance carrier at the last known address of each as follows:

By Registered Mail:

Mr. Bertram A. Watson	10633 Flaxman Houston, Texas 77029
Gulf Stevedores Corporation	Cotton Exchange Building Houston, Texas 77002
Texas Employers' Insurance Assn.	338 South Wayside Houston, Texas 77011

By Regular Mail:

Mr. W. Jiles Roberts, Attorney	617 Americana Building Houston, Texas 77002
Royston, Rayzor & Cook, Attorneys	877 San Jacinto Building Houston, Texas 77002
Bureau of Employees' Compensation	U. S. Department of Labor Washington, D.C. 20211

/s/ R. J. SHEA
R. J. Shea
Deputy Commissioner

Mailed: December 8, 1966

APPENDIX C

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GULF STEVEDORE CORPORATION AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION v. R. J. SHEA, DEPUTY COMMISSIONER AND BERTRAM A. WATSON	CIVIL ACTION No. 66-H-881

Royston, Rayzor & Cook (Carl O. Bue, Jr., Esq.), Houston, Texas, attorney for Plaintiffs.

Morton L. Susman, Esq., United States Attorney, and Jack Shepherd, Esq., Assistant United States Attorney, Houston, Texas, attorney for Defendant Shea.

W. Jiles Roberts, Esq., Houston, Texas, attorney for Defendant Watson.

May 2, 1967

MEMORANDUM:

In this action the employer (Gulf Stevedore Corporation) and its insurer (Texas Employers' Insurance Association) seek to have this court review and set aside as not in accordance with law a compensation order filed before Deputy Commissioner Shea (the Eighth Compensation District) entered December 8, 1966, pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §§ 901 et seq. In the questioned order, the Commissioner found that Bertram A. Watson, the longshore-

man - claimant, was totally and permanently disabled as result of an injury which he received February 6, 1957.

The review of this award under the cited statute is as fixed by the Administrative Procedure Act, 5 U.S.C.A. § 1009. The award is to be set aside only if unsupported by substantial evidence upon review of the entire record. [*O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *Strachan Shipping Co.* v. *Calbeck*, 190 F. Supp. 255 (S.D. Tex. 1961) and cases there cited.]

The basic facts are essentially undisputed. They are as follows.

Three distinct injuries are directly or indirectly involved. The earliest in point of time is an injury suffered by the claimant to his right shoulder in 1953. The injury was of a serious nature. As result thereof, he made claim under the Texas Workmen's Compensation Act, alleging permanent disability. After disposition of the pending litigation, the claimant returned to his regular duties and apparently suffered little, if any, disability to the affected shoulder thereafter. At the time of the hearing here in question, he was found to have no disability in the shoulder.

The injury of primary concern occurred February 6, 1957, when claimant received a crushing of his left lower extremity below the knee. A series of operations and other procedures over an extended period were had in an unsuccessful effort to avoid amputation. Amputation below the knee became necessary, and was performed in 1962. Thereafter he was fitted with a prosthesis and returned to work November 21, 1962. He worked regularly thereafter until April 7, 1966, except for a period of disability caused by the third injury.

The third injury occurred in August of 1965 when the claimant suffered a fall and a resulting injury to the groin

area. He presently has pending in this court a third party action wherein he contends that he suffered heavy money damages as result of disability resulting from this injury. The Commissioner has found that neither the injury in 1953 nor that in 1965 contributed in any way to the claimant's present disability. There is ample support in the evidence therefor.

Claimant's inability to work in April 1966 was the direct result of a small ulcer which developed on the head of the stump of his left leg, resulting from the pressure of use of the prosthesis. This ulcer was excised. The condition of the surface of the stump presently is much improved. Ulceration of this character is quite common in case of amputation, and may recur.

One of the surgical procedures followed in an attempt to avoid the amputation was a skin graft. Certain skin and tissue was taken from claimant's right, or donor, leg and grafted upon his left leg. The claimant has testified that he suffers certain cramping or aching in the right leg which he feels has worsened in recent months.

Two medical witnesses were offered, Dr. George H. Lane, an orthopedic surgeon who had treated claimant since the injury of 1957, and Dr. Sidney Barron Hardy (by deposition), a specialist in plastic and reconstructive surgery. The physicians testified, in summary, that the real source of claimant's difficulty now was the ulcer which had been excised from the stump of the left leg; that when the surface of the stump was sufficiently healed to permit the use of the prosthesis that his condition would be essentially the same as it had been since the amputation in 1962; that a definite program of treatment was in progress for this area and that the physicians had every reason to believe their efforts would be successful; that such difficulties were quite common in similar cases, but that usually when the

prosthesis was properly fitted it could be worn and used without great difficulty. As to the conditions of the right leg of which the claimant complained, it was the testimony of the doctors that this was not unusual. It was attributed to the fact that the right leg had been used more than it normally would by reason of the fact that the claimant had been on crutches and without benefit of his prosthesis for several months. The right leg was not shown to have any functional disability, although the removal of the skin and tissue was calculated to, and did, result in the loss of some sensitivity, and resulting numbness at the affected site.

The controversy here is this. In the light of such a factual background, is the finding of the Commissioner that the claimant is totally and permanently disabled sustained by substantial evidence. In my judgment, it is not. In Finding No. 7 the Commissioner points out that claimant has been totally disabled since April 1966; that there is a distinct possibility that further plastic surgery will be required. These findings are amply supported. But the conclusion, "Inasmuch as the claimant obviously is totally disabled at this time and since April of 1966, it would be speculation on the part of the Deputy Commissioner to hold this condition not to be permanent" is completely unwarranted. The record as a whole shows that the present condition which has rendered claimant unable to work is a temporary one which the physicians fully expect to correct. Granted that this or some similar difficulty may recur, in the great majority of cases remedies and cures are found.

As noted, claimant worked regularly as a longshoreman from 1962 until April 1966. It is undisputed that during this interval he received favored treatment at the hands of the employer and of his associates. He was assigned to

supervisory-type work requiring a minimum of walking or other physical effort. By reason of his seniority, in excess of 25 years on the docks, he was entitled to such consideration, although he has testified that he was unable fully and adequately to perform even these lighter duties. The claimant is 45 years of age. He has an eighth grade education and has some prior experience as a cook and as a dragline operator. The Commissioner finds that he cannot return to regular work as a longshoreman and that he cannot engage in unrestricted manual labor for any sustained period of time. These findings find support in the evidence. But the further finding that claimant "cannot pass a pre-employment medical examination", in my judgment, is not warranted. The physician suggested a number of lines of work which claimant might follow. The fact that he may no longer perform the most arduous types of physical labor does not mean that he is totally and permanently disabled. The Act defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury *in the same or any other employment.*" [Sec. 2(10)] (Emphasis added.) He has never sought to secure, or perform, any work except longshore work since his injury. It is rank speculation to hold he cannot, without at least an effort.

The award of the Deputy Commissioner will be enjoined and set aside. Clerk will furnish counsel a copy hereof.

Counsel will prepare and submit an appropriate decree.

Done at Houston, Texas this 2nd day of May, 1967.

/s/ BEN C. CONNALLY
United States District Judge

APPENDIX H

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GULF STEVEDORE CORPORATION AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION, *Plaintiffs* vs. R. J. SHEA, DEPUTY COMMISSIONER, AND BERTRAM A. WATSON, *Defendants*	CIVIL ACTION No. 66-H-881

FINAL JUDGMENT

The above numbered and entitled cause having been submitted upon the pleadings and briefs of the respective parties, argument of counsel, and the transcribed record of the hearing held by Deputy Commissioner R. J. Shea prior to the issuance of the COMPENSATION ORDER — AWARD OF COMPENSATION dated December 8, 1966, and the Court, having considered the pleadings, the transcribed record, briefs of the respective parties and argument of counsel and after due deliberation, being of the opinion that it has jurisdiction herein by virtue of 33 U.S.C.A. Sec. 921(b), that the COMPENSATION ORDER — AWARD OF COMPENSATION to the Defendant, Bertram A. Watson, in CASE NO. 3269-212 by the Defendant-Deputy Commissioner R. J. Shea of December 8, 1966, is not supported by reliable, probative, and substantial evidence in the record as a whole and therefore is not in accordance with law and that said COMPENSATION ORDER — AWARD OF COMPENSATION should be set aside and held for naught and its enforcement enjoined for

the reasons set out in the Court's findings of fact and conclusions of law contained in its written opinion of May 2, 1967, on file herein, now, therefore it is

ORDERED that the findings of fact and conclusions of law, dated May 2, 1967, contained in the Court's opinion of the same date and heretofore filed by the Court, be confirmed and adopted as the Court's findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure; and it is further

ORDERED, ADJUDGED and DECREED that the COMPENSATION ORDER — AWARD OF COMPENSATION to the Defendant, Bertram A. Watson, in CASE NO. 3269-212, dated and filed by the Defendant-Deputy Commissioner R. J. Shea on December 8, 1966, be and the same is hereby set aside and held for naught because it is not supported by reliable, probative, and substantial evidence in the record as a whole and therefore is not in accordance with law; and it is further

ORDERED, ADJUDGED and DECREED that the Defendant R. J. Shea, Deputy Commissioner, Eighth Compensation District, and his successors (if any), and the Defendant, Bertram A. Watson, each be and the same are each hereby permanently enjoined and restrained from, directly or indirectly in any manner, enforcing or attempting to enforce against Gulf Stevedore Corporation, Employer, and Texas Employers' Insurance Association, Insurance Carrier, the COMPENSATION ORDER — AWARD OF COMPENSATION to the Defendant, Bertram A. Watson, in CASE NO. 3269-212, dated and entered by the Defendant-Deputy Commissioner R. J. Shea on December 8, 1966.

SIGNED and ENTERED at Houston, Texas, this the ..... day of May, 1967.

/s/ BEN C. CONNALLY
United States District Judge